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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

Petitioner,

vs.

JOSEPH O'GRADY, WARDEN OF NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR PETITIONER.

WILLIAM L. MARBURY, JR.,
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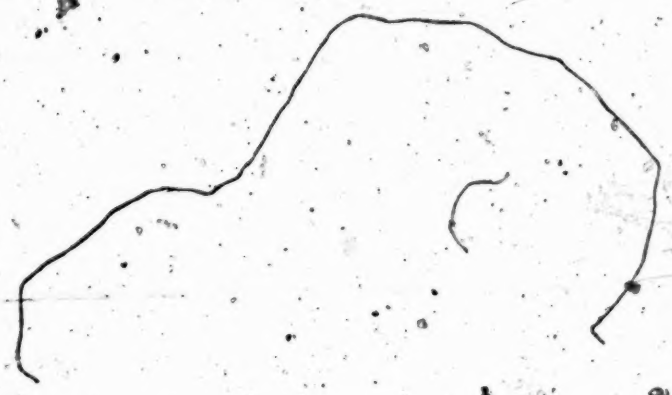

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR PETITIONER.

Opinions Below.

Neither the District Court of Lancaster County nor the Supreme Court of Nebraska filed opinions.

Jurisdiction.

The case is here on writ of certiorari granted by this Court on October 21, 1940, pursuant to Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Sec. 1 (U. S. C. Tit. 28, Sec. 344 (b)). The

judgment sought to be reviewed was entered in the Supreme Court of Nebraska on June 3, 1940 (R. 34). It affirmed a judgment entered in the District Court of Lancaster County on February 28, 1940, dismissing a petition for writ of *habeas corpus* on the ground that the petition failed to state a case for the issuance of the writ.

That the judgment of the Supreme Court of Nebraska was final in character does not admit of dispute. However, other jurisdictional questions are presented which call for discussion in the light of a careful analysis of the record. These questions are dealt with hereinafter in the portion of this brief devoted to argument. For present purposes it is sufficient to say that the petitioner contends that the judgment under review necessarily decided adversely to petitioner a substantial federal question which was properly presented by the record.

Statutory Provisions Involved.

The proceedings in this case were initiated pursuant to Sec. 29-2801 of Art. 28 of Chapter 29 of the Compiled Statutes of Nebraska (1929 Ed.) reading as follows:

> If any person, except persons convicted of some crime or offense of which they stand committed, or persons committed of treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, now is or shall be confined in and jail of this state, or shall be deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to anyone of the judges of the District Court or to any County judge, and there is at the same time produced to such judge a copy of the commitment or cause of detention of such persons, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to

allow a writ of *habeas corpus*, which writ shall be issued forthwith by the clerk of the District Court, or by the county judge, as the case may require, under the seal of the court whereby the person allowing such writ is a judge, directed to the proper officer, person or persons who detained such prisoner (G. S. p. 804; Ann. 2513; Comp. 8097; R. S. 1913, 9247; C. S. 1922, 10276).

Other relevant provisions of the Compiled Statutes of Nebraska read as follows:

Sec. 29—2823. The proceedings upon any writ of *habeas corpus* shall be recorded by the clerk and judges, respectively, and may be reviewed as provided by law for appeal in civil cases.

Sec. 20—1911. Supreme Court, Appelate Jurisdiction Defined. A judgment rendered or final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors appearing on the record.

Sec. 20—1912. Same proceeding for reversal of District Court Judgments and Decrees, Exceptions, Transcript, Filing Within Three Months Jurisdictional. The proceedings to obtain a reversal, vacation or modification of judgment and decrees rendered or final orders made by the District Court. * * * shall be by filing in the Supreme Court a transcript certified by the clerk of the District Court, containing the judgment, decree or final order sought to be reversed, vacated or modified within three months from the rendition of such judgment or decree or the making of such final order * * *; the filing of such transcript shall confer jurisdiction in such cause upon the Supreme Court.

Sec. 20—1919. Briefs in Supreme Court General Rules. What Appellant's Brief must set out, plain errors considered. The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be

urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or other assignment of error shall be required beyond or in addition to the foregoing requirement. The Supreme Court may, however, at its option, consider a plain error not specified in appellant's brief.

Sec. 28—538. Burglars, Violation, Penalty, Whosoever wilfully, maliciously and forcibly breaks and enters into any * * * railroad car factory, station house, railroad car * * * with intent to kill, rob, commit a rape, or commit any felony, with intent to steal property of any value, shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year, or by a fine not exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding six months.

Sec. 28—534. Burglary with Explosives, Penalty. Whoever shall break and enter either by day or by night, any building, whether inhabited or not, and open or attempt to open any vault, safe, or other secure place, by the use of, or the attempted use of, nitroglycerine, dynamite, gunpowder, or any other explosive, electricity as a means of burning or melting power agency or in any form of any electrical means whatsoever, acetylene gas, oxyacetylene gas, or any gas in any form whatsoever, with intent to steal or injure the property of another, shall be deemed guilty of burglary with explosives or by burning and upon conviction thereof shall be sentenced to the penitentiary for life, or for any other term not less than twenty (20) years.

The following rules of the Supreme Court of the State of Nebraska are also relevant. (See Revised Rules of the Supreme Court of the State of Nebraska in force September 19, 1938.)

3. Defaults. Whenever the brief of the party having the affirmative is not on file by brief day, the judgment will be affirmed or the proceedings dismissed, un-

less otherwise ordered on sufficient showing. When default has been made by the other party and there is due proof of service of process and the briefs of the party holding the affirmative are on file with proof of service thereof within the time provided by Rule 12, he may proceed *ex parte*. The hearing of no case shall be delayed by default of either party in serving or filing briefs. To avoid such result the case will be disposed of as if the delinquent party's brief had not been served and filed; provided that the court may under special circumstances and on suitable terms otherwise order.

14. Briefs—How Printed and Taxed.

a. How Printed.—All briefs shall be printed on unglazed white book paper on pages 6½ inches wide and 9½ inches long, trimmed size; the printed matter to be 24 picas wide and 42 picas long. The type used in the printing may be 12 point but not smaller than 11 point, except that exhibits may be printed in smaller sizes when necessary. Italic type may be used on citations.

d. The Clerk of this court shall refuse to receive or file any brief not prepared in accordance with this rule and he shall immediately notify counsel of the objections thereto.

Statement of the Case.

The purpose of this proceeding is to review a decision of the Supreme Court of Nebraska affirming a judgment of the District Court of Lancaster County, Nebraska, dismissing a petition for writ of *habeas corpus* filed on February 14, 1940. The significant allegations of that petition were as follows:

On September 19, 1932, the petitioner was taken into custody. Thereafter he was advised that he was being held for trial in Valley County, Nebraska, on a charge of burglary and that if he would plead guilty to that charge, he would be dealt with leniently. After a discussion with the

county attorney of Valley County, a bargain was arrived at "in which it was understood that if your petitioner would plead guilty, the sentence meted out to him by the court would not exceed three years' imprisonment in the Nebraska State Penitentiary" (R. 2). On September 27, 1932, petitioner was brought before the District Court of Valley County, Nebraska. As appears from the journal entry of the judgment, the petitioner waived preliminary examination and asked that he be arraigned at once. "Thereupon the Defendant was duly and legally arraigned and plead 'Guilty' to the Information as charged." The defendant was thereupon sentenced to confinement at hard labor in the Nebraska Penitentiary for a period of twenty years (R. 3).

Prior to entering his plea, petitioner had never seen a copy of the information and was under the impression that he was pleading guilty to a charge of common burglary (which carries a maximum penalty of ten years in the State Penitentiary, *supra*, p. 4). As soon as the sentence had been pronounced, petitioner protested and requested that he be furnished with a copy of the charge. This request was refused (R. 3). Petitioner then requested permission of the court to withdraw his pleas of guilty and at the same time requested that an attorney be appointed to assist and advise him and that he be given an opportunity to defend himself (R. 3). These requests were likewise refused and within the hour petitioner was removed to the State Penitentiary (R. 3). It was not until after petitioner had been committed to the penitentiary that he discovered that he had been "duped and inveigled into entering a plea of guilt to a charge of burglary with explosives" (which carries a minimum penalty of twenty years in the State Penitentiary, *supra*, p. 4). Petitioner knew nothing of appellate procedure and lacked funds to employ counsel and was therefore unable to carry an appeal to the Supreme Court of

Nebraska. His petition herein was prepared with the aid of another inmate of the Nebraska State Penitentiary (R. 3).

The petition for the writ of *habeas corpus* challenged the legality of the commitment pursuant to which petitioner was being detained in the Nebraska Penitentiary on the ground that the commitment was based upon a void and illegal judgment. In support of that petition, a number of contentions were advanced, of which the following are material here: (1) that petitioner was deprived of his constitutional right to know the nature of the accusation for which he was to answer, contrary to the Sixth Amendment to the Constitution of the United States (R. 4), (2) that he was deprived of his constitutional right to have the assistance of competent legal counsel to aid and advise him, contrary to the Sixth Amendment to the Constitution of the United States (R. 4), and (3) that contrary to the Fourteenth Amendment to the Constitution of the United States, he was arbitrarily deprived of his constitutional right to due process of law "in that the trial court did not have jurisdiction to arraign, or to accept a plea from your petitioner, without first supplying him with a copy in writing of the nature and cause of the accusation for which he was to answer; of without notifying him in open court, in language sufficiently common to be understood by the petitioner, of the nature and cause of the accusation for which he was to answer; nor did the trial court have jurisdiction to proceed to trial against your petitioner, after your petitioner had requested the assistance of an attorney, without first appointing competent legal counsel to aid and advise him in his defense" (R. 5). Simultaneously with the petition for writ of *habeas corpus,* petitioner filed a motion for leave to proceed *in forma pauperis* and for the appointment of counsel to represent him (R. 11-13).

On February 28, 1940, the trial court entered an order denying the petition for writ of *habeas corpus* "because the petition filed herein does not state a cause of action therefor" (R. 13). At the same time, the trial judge addressed a communication to the petitioner reading as follows (R. 14):

> "My dear sir:
>
> The honorable John L. Polk, presiding judge for this district, has assigned to me for disposition your petition for writ of *habeas corpus* filed in this court. I am sorry to inform you that you have not stated a cause of action which permits this court to grant a writ of *habeas corpus,* and your application, therefore, has been denied and your petition dismissed at your costs.
>
> Your own petition shows that more than seven years ago in a district court of this State you waived preliminary hearing, were arraigned upon the information, and pleaded guilty thereto in open court. Under such circumstances the law is that you waived any right to have the information served upon you as contended for in your petition.
>
> The statute, Section 29-2801, provides: 'If the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of *habeas corpus.*'
>
> If the statements made in your petition are true, you probably suffered an injustice, but the remedy cannot be by *habeas corpus.* To obtain release by *habeas corpus,* the judgment must be absolutely void. Your best remedy, under the circumstances, is before the Parole and Pardon (fol. 65) Board of the State of Nebraska which is composed of men who are always willing to give attention to such matters if they appear to have merit in them."

On March 4, 1940, petitioner filed a motion for reconsideration of the order denying the petition for writ of *habeas*

corpus (R. 13-21). This motion, while extremely inartificial, clearly presented the contention that petitioner had been denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, by reason of the trickery and deception practiced upon him by the county attorney of Valley County, Nebraska, as the result of which he had been induced to plead guilty to a crime with which he did not know that he had been charged. This motion was overruled (R. 21).

On March 25, 1940, petitioner filed his notice of appeal (R. 27), together with motions for the appointment of counsel (R. 23), and the allowing of the costs of printed briefs for appeal (R. 25). Each of these motions stated that the petitioner was without funds to pay such costs or to obtain the services of counsel. These motions were promptly overruled (R. 27). Petitioner thereupon filed in the Supreme Court of Nebraska his motion for the appointment of counsel and the allowance of the cost of printed briefs on appeal, or in the alternative, for permission to file typewritten briefs, or in the alternative, that the appeal be heard on the record (R. 28). Attached to the motion were copies of a type-written brief* which clearly presented the federal questions which the petitioner sought to raise.

On May 20, 1940, the Supreme Court of Nebraska entered an order denying petitioner's motion. This order recited that "the court having examined the transcript from the district court of Lancaster County, which transcript contains appellant's original petition for writ of *habeas corpus* containing a brief in support of such petition, and having also examined the typewritten brief of appellant tendered herein, and being fully advised in the premises, finds that

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*NOTE.—In printing the transcript of record, this brief was omitted by the clerk of this Court (R. 33). A copy is, however, included in the original transcript of record.

the appeal herein is without merit and that the record contains no probable error'' (R. 34).

Thereafter, on June 3, 1940, the Supreme Court entered a final judgment, the material portion of which is as follows:

> ''This cause coming on to be heard upon appeal from the district court of Lancaster County, the same having been reached in its regular order, and no briefs appearing on file as required by the rules of court, it is by the Court considered, ordered and adjudged that the judgment of said district court be, and hereby is, affirmed'' (R. 34).

The petition for certiorari was filed in this Court on August 22, 1940 and granted on October 21, 1940.

Specification of Errors.

1. The Supreme Court of Nebraska erred in affirming the judgment of the trial court dismissing the petition for the writ of *habeas corpus*.

2. The Supreme Court of Nebraska erred in failing to hold that the judgment originally entered in the District Court of Valley County was wholly void.

3. The Supreme Court of Nebraska erred in failing to hold that the petitioner was entitled to be released from custody under a commitment based upon a judgment obtained in violation of the guarantee of due process of law contained in the Fourteenth Amendment to the Federal Constitution.

Summary of Argument.

I.

This court has jurisdiction pursuant to Section 237 of the Judicial Code as amended. The judgment of the Supreme Court of Nebraska was final in character. The peti-

tion for the writ of *habeas corpus* and the motion for reconsideration, taken together, adequately presented a substantial claim based upon the Federal Constitution. The orders of the Supreme Court of Nebraska, taken together, necessarily decided that claim adversely to the petitioner.

II.

The Supreme Court of Nebraska erred in affirming the judgment of the trial court denying the petition for writ of *habeas corpus*. Under the Nebraska law, the writ of *habeas corpus* must be granted upon a showing that petitioner is being detained pursuant to a judgment which the court lacked jurisdiction to enter. The District Court of Valley County had no jurisdiction to enter a judgment based upon a plea of "guilty" obtained by misrepresentation. Such a judgment deprived petitioner of his liberty without the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

ARGUMENT.

The Jurisdiction of This Court.

A.

The Judgment Sought To Be Reviewed Is Final In Character.

The order of the Supreme Court of Nebraska entered on June 3, 1940, affirming the judgment below finally disposed of all questions presented by the record. *De Bolt* v. *McBrien*, 96 Neb. 237, 147 N. W. 462. That a judgment of the highest court of a state affirming an order dismissing a

petition for writ of *habeas corpus* is final in character is not debatable. In *Bryant* v. *Zimmerman*, 278 U. S. 63, Mr. Justice VAN DEVANTER said (at page 70):

> "In the early case of *Holmes* v. *Jennison*, 14 Pet. 540, 563, 568, 597, this Court held after much consideration that a proceeding in habeas corpus in a state court to obtain the release of one held in custody upon a criminal charge, where the detention is alleged to be in violation of the Constitution of the United States, is a 'suit' within the meaning of the jurisdictional statute, and that an order of the state court of last resort refusing to discharge him is a final judgment in that suit and subject to review by this Court. That holding has been respected and given effect in an unbroken line of later decisions, all of which in their material facts and surroundings were like the case now before us. It also has been followed in other cases related in principle."

B.

A Substantial Federal Question Was Properly Presented To The Court Below.

The petition for the writ of *habeas corpus* and the motion for reconsideration were drawn by petitioner with the assistance of another inmate of the Nebraska State Penitentiary. Nevertheless, they were adequate to present the question whether the judgment pursuant to which petitioner is now being detained in the Nebraska State Penitentiary, was void because obtained without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution.

The facts set forth in those petitions, if true, show that an official of the State of Nebraska misled petitioner as to the nature of the offense with which he was charged and induced him to enter a plea of "guilty" to that charge

under false representations as to the sentence which would be meted out to him, and that the trial court, with knowledge of the deception which had been practiced upon the petitioner, refused to permit withdrawal of petitioner's plea and refused petitioner's request for a copy of the information and the appointment of counsel to represent him. Clearly the contention that the petitioner was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, is not lacking in substance. See *infra* pp. 21-22.

The fact that petitioner based some of his contentions on the Sixth rather than the Fourteenth Amendment, is unimportant, inasmuch as the petitioner's pleadings clearly presented a claim of federal right. In *Bryant* v. *Zimmerman,* 278 U. S. 63, Mr. Justice VAN DEVANTER said at page 67:

> "No particular form of words or phrase is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Assuming, therefore, that the petition for the writ of *habeas corpus* and the motion for reconsideration were adequate to present a substantial Federal question, there remains for consideration whether, under the practice prevailing in the State of Nebraska, the court is free, on petition for a writ of *habeas corpus,* to consider the facts upon which petitioner's claim to federal right was based. Where the writ of *habeas corpus* is invoked in state tribunals, this Court looks to the courts of that state for a definition of the scope of the proceedings. *Herndon* v. *Lowry,* 301 U. S. 242; compare *Chambers* v. *Florida,* 309 U. S. 227.

The letter addressed by the trial judge to the petitioner indicates that *habeas corpus* is the proper method to obtain release from a void judgment (R. 15). This is clearly in accordance with the decisions of the Supreme Court of Nebraska. Thus in the case of *Michaelson* v. *Beemer*, 72 Neb. 761, 101 N. W. 1007, it was held proper, on petition for writ of *habeas corpus*, to examine into the validity of the commitment of petitioner who, after entering a plea of not guilty, waived a jury trial and was found guilty by the court sitting without a jury. The Supreme Court of Nebraska said (at page 763):

> "The first question presented is as to whether habeas corpus will lie in the case at bar, no error proceedings having been instituted for the purpose of reversing the judgment of the District Court, in which the commitment was issued. We have frequently held that the writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for the plea of a writ of error. This rule is well stated in the case of *In re Fenton*, 55 Neb. 703, in which we held:
>
> > 'The writ of habeas corpus cannot operate as a proceeding in error. If a person is restrained of his liberty by virtue of an absolutely void judgment, he must be discharged on habeas corpus. To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity.'
>
> This doctrine is supported by an unbroken line of authorities in both the federal and state courts of this nation, and consequently the question we are confronted with at the threshold of this controversy is, was the judgment and sentence of the District Court absolutely void, and the warden, through his counsel the Deputy Attorney General, contends that they were merely erroneous.

* * * * * * *

When the information was filed in the District Court for Garfield County, charging in statutory language the prisoner with the offense of grand larceny, and he came into court either voluntarily or under the custody of the sheriff, the court became possessed, under the laws of the state, with the jurisdiction of the person of the defendant, and was authorized to make such orders touching the arraignment of the prisoner, his admission to bail, or commitment in default of bail, as the statute provides. But when the defendant pleaded not guilty, and the cause was set for trial on such plea, the only tribunal provided by the constitution and the laws of this state that had authority to determine whether the defendant was guilty or innocent of the offense charged in the information, was a jury summoned from the county in which the offense was alleged to have been committed. When the judge of the court, acting under a mistaken conception of the effect of the consent of the prisoner, undertook to determine the question of his guilt or innocence of the felony charged, his judgment and sentence passed on such judgment was a mere nullity and absolutely void. From this line of reasoning it follows that the commitment under which the respondent warden detains the petitioner in the penitentiary is a legal nullity. It therefore follows that so much of the judgment of the District Court as remanded the prisoner to the custody of the warden of the penitentiary is erroneous and should be set aside."

So in the case of *In re Resler,* 115 Neb. 335, 212 N. W. 765, it was held proper, on petition for writ of *habeas corpus* to examine into the validity of a judgment of the trial court sentencing petitioner to penal servitude where the judgment was alleged to have involved a violation of a provision of the State Constitution guaranteeing against double jeopardy. In that case the Court said (at p. 338):

"That, in this case, the petitioner may properly present the question involved by *habeas corpus,* we have no

doubt. It is firmly established that if a court or a judge thereof which render a judgment, or who enters an order, has no jurisdiction to perform the act done, either because the proceeding or the law under which it is taken is unconstitutional, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged. *In re Havlik,* 45 Neb. 747; *In re Application of McMonies,* 75 Neb. 702; *In re Vogland, 48 Neb. 37.*

In the present case it is true that the ground for *habeas corpus* was not the invalidity of an act of the legislature under which the petitioner was informed against, but because it was claimed to be a second prosecution for the same offense contrary to the express provision of our Constitution. In other words, the contention is that the constitutional rights of the defendant were violated by her second arrest and detention for the same offense contrary to the express terms of the Constitution that no person shall be twice brought in jeopardy for the same offense. *It is difficult to see why a conviction and punishment under an unconstitutional law is more a violation of a person's constitutional rights than an unconstitutional conviction under a valid law.* In the first case it is true the court has no authority to take cognizance of the case, but in the second it has no authority to render judgment against the defendant." (Emphasis supplied.)

To the same effect see *Kuwitzky* v. *O'Grady,* 135 Neb. 466, 282, N. W. 396.

On the other hand, in the case of *Darling* v. *Fenton,* 120 Neb. 829, 225 N. W. 582, the Supreme Court of Nebraska held that on petition for writ of *habeas corpus,* the court could not inquire into whether the judgment, pursuant to which petitioner was being detained, had been entered as the result of a plea of "guilty" to a charge of murder induced by fear of mob violence. This case was cited with

approval in *Carlsen* v. *State,* 129 Neb. 84, 261 N. W. 339, where the Court said at page 345:

> "* * * it should be noted that the writ of *habeas corpus* does not afford a corrective judicial process to remedy an error of fact at the trial, without which a conviction would not have resulted. *Habeas Corpus is not a proper remedy to secure a release from prison of one sentence upon a plea of guilty induced by fear. Darling* v. *Fenton,* 120 Neb. 829."

Other cases lay down the general rule that on petition for writ of *habeas corpus,* the Court cannot consider facts not shown by the record of the original proceedings unless such facts are such as to show that the court lacked "jurisdiction" to enter the judgment. *Hulbert* v. *Fenton,* 115 Neb. 818, 215 N. W. 104. Compare *Alexander* v. *O'Grady,* 137 Neb. 645, 290 N. W. 718; *Davis* v. *O'Grady,* 137 Neb. 708, 281 N. W. 82; *State* v. *O'Grady,* 137 Neb. 824, 291 N. W. 497.

It may be observed that if the scope of the writ of *habeas corpus* is so narrow as to preclude consideration of the facts set forth in this record, then the Nebraska law provides no remedy for the vindication of petitioner's rights. Assuming that the writ of error *coram nobis* has not been abolished by recent legislation in Nebraska, (as to which see 19 *Nebraska Law Bulletin* 150), petitioner could not avail himself of that remedy in view of the length of time which has elapsed since the judgment was entered against him in the District Court of Valley County. In *Newcomb* v. *State,* 129 Neb. 69, 261 N. W. 348, it was held that an application for the writ of error *coram nobis* must be brought within two years of the date of judgment and that confinement in the State Penitentiary was not a disability sufficient to extend that period.

In the absence of clear and compelling decisions of the Nebraska courts, this Court will hesitate to accept any con-

tention restricting the scope of the writ of *habeas corpus* so narrowly as to preclude review of the validity of a judgment obtained in clear violation of the guarantees of the Federal Constitution. *Mooney* v. *Holohan,* 294 U. S. 103. Accordingly, it is submitted that the record properly presented for the consideration of the state courts, a substantial federal question, namely, whether the judgment pursuant to which petitioner is being detained in the Nebraska State Penitentiary, deprived petitioner of his liberty without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution.

C.

The Judgment Below Did Not Rest Upon An Adequate Non-Federal Ground

Assuming that under the Nebraska practice the scope of the writ of *habeas corpus* is sufficiently broad to open for review the validity of the judgment originally entered in the District Court of Valley County and to permit the court to determine that validity in the light of the facts set forth in the petition, it is clear that the judgment of the District Court of Lancaster County necessarily decided the federal questions presented by the petitioner. Under the Nebraska law, a petition for the writ of *habeas corpus* may be dismissed if the petition on its face shows that the granting of the writ is without merit. However, for the purpose of determining the merit of the petitioner's claim, the facts set forth in the writ are taken to be true. *Darling* v. *Fenton,* 120 Neb. 829, 235 N. W. 582; and see Compiled Statutes of Nebraska (1929 Ed.) Sec. 29-2801, *supra,* p. 2.

Whether the decision of the Supreme Court of Nebraska necessarily decided the federal question presented by the record is a question of greater difficulty. If the final order of the Supreme Court of Nebraska entered on June 3,

1940, is taken by itself, there is color for the contention that the judgment below rested upon an adequate non-Federal ground and is hence not subject to review here. Under the Nebraska statutes regulating appeals in such cases, the Supreme Court is empowered to provide by rule, for the filing of briefs and is not bound to consider errors not specified in appellant's brief, *supra* p. 3. In the exercise of this power, the Supreme Court has by rule required the filing of printed briefs in default of which "the judgment will be affirmed or the proceedings dismissed, unless otherwise ordered on sufficient showing", *supra* pp. 4-5. As the appellant failed to file a printed brief as required by the rules, it may well be argued that the court below was not required to consider any errors appearing in the record.

It is worthwhile to note, however, that both the statute and the rule of court clearly reserve the right to consider "plain error even if not specified in appellant's brief". Nor is it obligatory on the court to affirm the judgment below because of default in the filing of such brief. *DeBolt* v. *McBrien*, 96 Neb. 247, 147 N. W. 462. Accordingly, even if this court were to treat the order of June 3, 1940 as standing alone, the appropriate proceeding, in view of *Patterson* v. *Alabama*, 294 U. S. 600, would seem to be to remand the case for further consideration by the Supreme Court of Nebraska.

In the case cited, this court reviewed on writ of certiorari a judgment of the Supreme Court of Alabama confirming a conviction of rape. The defendant had moved to quash the trial venire because of the exclusion of negroes from jury service in the county where the trial was had. Evidence supporting the motion was embodied in bills of exception which the Supreme Court of Alabama refused to entertain because filed too late. Under the Alabama statutes, it appeared that the court might, in its discretion,

have considered the evidence set forth in the untimely bill of exceptions. Finding that the evidence was sufficient to show that the petitioner had been denied the equal protection of the laws guaranteed by the Fourteenth Amendment, this court remanded the case to the state court for further proceedings in the light of this determination.

One factor influencing the result in the *Patterson* case is not present here, namely, that in *Powell* v. *Alabama*, 287 U. S. 45, this court had reversed the conviction of another defendant tried in the same proceeding. The absence of this factor would not seem to justify a different result here. If the court below had been convinced that the judgment upon which petitioner's commitment rested was void because obtained in violation of the Fourteenth Amendment, there can be little doubt that it would have exercised its discretion to deal with so flagrant an error. At least the court "should have an opportunity to examine its powers in the light of the situation."

In any event, petitioner's right of review of the judgment below does not rest upon such subtleties. The order of June 3, 1940 was but the necessary consequence of the court's previous order of May 20, 1940, denying petitioner's motion to dispense with the printing of his brief. The two orders must be read together. When this is done, the true nature of the ruling below becomes apparent. For the avowed reason for the denial of the petitioner's motion was the finding of the court, after examination of the record and of typewritten briefs, that the appeal lacked merit. *Supra* pp. 9-10. Plainly it would have been futile for petitioner to file a printed brief in a case already decided against him on the merits. The salutary rules limiting the jurisdiction of this court do not deserve the reproach that they require the denial of fundamental rights because of the failure of litigants to accomplish useless formalities.

Compare *Rogers* v. *Alabama,* 192 U. S. 226, where MR. JUSTICE HOLMES said (at page 230):

> "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

It is submitted, therefore, that the courts below must be deemed to have considered and disposed of the substantial federal question presented by the petitioner.

Reference should be made at this point to the previous discussion with reference to the scope of the writ of *habeas corpus.* Admittedly, nothing in the Federal Constitution restricts the state's right to determine the ambit of the writ. So long as an adequate method for the vindication of federal rights is supplied, the state's freedom of choice in providing remedies remains untrammelled. Accordingly, the refusal by the state court, on writ of *habeas corpus,* to vindicate a claim of federal right because of the form of remedy invoked, has been deemed an adequate non-federal ground of decision. *People of State of New York Ex Rel Doyle* v. *Atwell,* 261 U. S. 590. However, for reasons hereinbefore discussed, it would seem that this principle has no application in the case at bar.

The Merits.

On the merits, the issue is whether the judgment pursuant to which petitioner is now being detained, is wholly void. We must accept the conclusion of the Supreme Court of Nebraska that nothing in the Constitution or Statutes of that State justifies an affirmative answer, *Powell* v. *Alabama,* 287 U. S. 45, 60. But a judgment entered in disregard of the guarantees of the Fourteenth Amendment is clearly void. And it is one of the highest functions of this court to guide State tribunals in the proper construction and appli-

cation of those guarantees. *Chambers* v. *Florida,* 309 U. S. 227; *Avery* v. *Alabama,* 308 U. S. 444, 447; *Herndon* v. *Lowry,* 301 U. S. 242; *Bryant* v. *Zimmerman,* 278 U. S. 63.

That the judgment of the District Court of Valley County is wholly void, does not admit of doubt, in the light of recent decisions of this Court. A judgment based on a plea of "guilty" obtained by deception is no more valid than a judgment based on a jury's finding of guilt, obtained in like manner. Compare *Mooney* v. *Holohan,* 294 U. S. 103; *Chambers* v. *Florida, supra.* The refusal to permit such a plea to be withdrawn, to furnish the petitioner with a copy of the charge and to appoint counsel for his defense, presents a case no less flagrant than some which have recently provoked the condemnation of this court. *Powell* v. *Alabama,* 287 U. S. 45; *Norris* v. *Alabama,* 294 U. S. 587; *Brown* v. *Mississippi,* 297 U. S. 238; *Pierre* v. *Louisiana,* 306 U. S. 354.

Although *Avery* v. *Alabama,* 308 U. S. 444, gives strong support to such a contention, it is not necessary for the purposes of this case to argue that the right to the assistance of counsel guaranteed by the Fourteenth Amendment is no less extensive than that afforded by the Sixth (as to which see *Johnson* v. *Zerbst,* 304 U. S. 458). The facts in this record require the invocation of no such sweeping generality. We have here an accused man, unlettered in the law, present in court for the first time in his life, induced to plead guilty of a crime which carries a maximum sentence of life imprisonment by false representations as to the nature of the charge and as to the consequences of his plea, and once having fallen into the trap, denied the means of extricating himself. Protection against such a flagrant violation of fundamental fairness is certainly "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 325.

Conclusion.

The judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

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